STATE OF MICHIGAN

COURT OF APPEALS

LYLE E. FARVER,

Plaintiff-Appellant,

V

CITIZENS BANK,

Defendant-Appellee,

and

DR. RAY H. KING, JR.

Defendant.

UNPUBLISHED
May 21, 2002

No. 227517
Jackson Circuit Court
LC No. 99-094862-CZ

Before: Saad, P.J., and Owens and Cooper, JJ.

PER CURIAM.

Plaintiff, Lyle Farver, appeals as of right from the trial court's order of final judgment dismissing his claims against Citizens Bank. Farver's issues on appeal concern two orders granting summary disposition to Citizens on Farver's conversion and negligence claims. We affirm.

I. Facts and Procedural History

On May 26, 1993, Farver entered into a guaranty agreement with Citizens[1] to secure financing on behalf of his son-in-law, Chris Clark, for Chris Clark, Inc., d/b/a Centurion Auto Sales & Leasing. The guaranty provides, in part:

> As inducement for certain loans, advances, credit and other banking transactions extended or made to Chris Clark, Inc., DBA Centurion Auto Sales & Leasing (herein called customer), the undersigned . . . does hereby guarantee to the CITY BANK AND TRUST COMPANY, N.A. . . . (hereinafter called Bank)

[1] Farver entered the guaranty agreement with City Bank and Trust Company, N.A., which was later acquired by or renamed Citizens Bank. For simplicity, we refer to the bank as Citizens throughout this opinion.

> its successors or assigns, the full prompt payment of all sums, monies, notes, bills, loans or other indebtedness which shall at any time be due or payable to said Bank . . . from the said customer, whether now owing or hereafter contracted, and all liabilities which the said customer has incurred, or is under, or may incur or be under to the said Bank, including reasonable attorneys fees and legal expenses, whether arising from dealings between the Bank and the said customer, or from other dealings by which the Bank may become in any manner whatever a creditor of the said customer. In particular the undersigned guarantees payment of the attached Note and any renewals thereof.

In two undated agreements entitled "Authority to Pledge or Hypothecate," Farver and his wife and "Lyle E. Farver, Pres." also pledged numerous stock certificates as collateral security "for each and every obligation and liability of the customer to [Citizens] . . . ."

On August 25, 1994, Citizens extended a line of credit to Clark in the amount of $300,000. On September 25, 1995, Citizens issued a commitment letter to extend a construction loan and real estate mortgage to Clark, the mortgage issuing on March 20, 1996 in the amount of $246,400. The commitment letter names Clark and his wife as guarantors. However, in October 1995, the commitment was amended to (1) cross-collateralize the loan "by the marketable securities that secure the company's line of credit" and (2) name Clark and Ray H. King as guarantors.

In the fall of 1996, Citizens informed Clark of its termination of the $300,000 line of credit. In response, Farver obtained a cashier's check from another bank for $179,304.06 and, in January 1997, paid Citizens the amount Clark owed on the line of credit. Farver's attorney then contacted Citizens by telephone and by letter dated February 4, 1997. In the letter, Farver's attorney requests that Citizens "release the stock secured by the hypothecation agreement executed by Mr. And Mrs. Farver." The letter acknowledges the existence of the construction loan and mortgage, but states that the loan was over-collateralized based on the value of the building and the value of the Farvers' stocks held as security. The record reflects that Citizens declined to return the stock to Farver as requested.

According to Farver, Citizens continued to extend credit to Clark throughout 1997, including extending an additional line of credit and financing vehicles for his business. Citizens asserts that Clark's indebtedness was primarily based on overdrafts and legal fees. On August 13, 1997, Citizens sent a letter to Farver to inform him that Clark was in default on loans amounting to $312,472.72, and that Citizens accelerated the balance due. The letter further states that Clark filed for bankruptcy and that Farver, as guarantor and because he pledged stocks as security, was liable to Citizens for the balance. Thereafter, Citizens received $203,075.02 from the bankruptcy trustee for the sale of the mortgaged real estate. On October 28, 1998, Citizens sold Farver's stock for $152,207.59, to satisfy Clark's remaining debt.

On January 22, 1999, Farver filed a complaint against Citizens and King. Specifically, Farver alleged that Citizens is liable for conversion for selling his stock after he requested its release in January 1997. Farver also alleged that Citizens was negligent for continuing to loan money to Clark, failing to place liens on cars it financed for Clark and failing to collect monies from King, the other guarantor of the real estate mortgage and construction loan. Farver also asserted a claim for subrogation against King.

In lieu of filing an answer, Citizens filed a motion for summary disposition on August 26, 1999. Citizens argued that the conversion claim should be dismissed under MCR 2.116(C)(8) and (C)(10) because Farver pledged the stocks to cover all of Clark's past and future liability to Citizens and because Citizens acted in conformity with its contractual rights. Therefore, Citizens asserted, the liquidation of the stocks was not a wrongful conversion of Farver's property. Citizens further asserted that the negligence claim should be dismissed under MCR 2.116(C)(8) because Farver failed to allege a specific duty Citizens owed to Farver. Citizens also claimed that the trial court should dismiss the negligence count because no reasonable juror could conclude that defendant performed its duties negligently in loaning money to Clark or in selling Farver's stocks.[2]

In response, Farver claimed that he paid off the line of credit and attempted to terminate the guaranty in January 1997 and that he could not be liable for any loans made after that date. Farver explained that he did not assert a claim for breach of contract because Citizens' conversion and negligence occurred after he terminated the guaranty agreement. Because Citizens sold Farver's stock to pay the indebtedness Clark incurred after the termination, specifically between May and September 1997, Citizens should be held liable for conversion and negligence. Alternatively, Farver asserted that Citizens terminated the guaranty agreement when it ended the line of credit during the fall of 1996. Farver declined responsibility for any portion of the real estate mortgage and construction loan but maintained that he is entitled to recover at least the amount applied to indebtedness outside those obligations incurred after Citizens discontinued the line of credit.

Following oral argument, the trial court issued a written opinion and order on October 13, 1999. The trial court granted summary disposition to Citizens on Farver's conversion claim because it found that Farver never terminated the guaranty agreement and, when Citizens sold Farver's stocks, "it was fully authorized to do so and it did not wrongfully convert Farver's property." The trial court denied Citizens' motion on Farver's negligence claim because, though not asserted by Farver, the Uniform Commercial Code imposes a duty of "good faith" and there remained a genuine issue of material fact regarding whether Citizens acted in good faith by failing to stop Clark's overdrafts, failing to secure liens and failing to collect from King.

On October 27, 1999, Citizens filed a motion for reconsideration regarding Farver's negligence claim. Citizens argued that the trial court erred by applying the UCC's good faith provision to create a tort action for a breach of a duty of good faith because Michigan law does not recognized such a tort. In contrast, Farver argued that, "there is an independent duty created separate from the guaranty contract and supported by existing Michigan law."

On November 4, 1999, the trial court issued an opinion and judgment and, relying on MCR 2.116(C)(8), it granted summary disposition to Citizens on Farver's negligence claim. The trial court found that, if there was a breach of an agreement between Farver and Citizens, that Farver should have brought a claim for breach of contract. Further, the trial court asserted that

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[2] Citizens also argued that summary disposition should be granted for the subrogation claim against King. However, the trial court declined to consider that argument because Citizens is not a proper party to that claim.

Farver could not maintain a separate tort action based on an obligation created by the underlying contract. Accordingly, because the judgment disposed of all of Farver's claims against Citizens, the trial court entered judgment for Citizens.[3]

II. Analysis

A. Standard of Review

Farver challenges the trial court's grant of summary disposition on both his conversion and his negligence claims. The trial court relied on MCR 2.116(C)(8) in granting Citizens' motion for summary disposition on Farver's negligence claim and relied on MCR 2.116(C)(10) in granting Citizens' motion on Farver's conversion claim. As our Supreme Court explained in *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999):

> A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." When deciding a motion brought under this section, a court considers only the pleadings. MCR 2.116(G)(5).
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> A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [Citations omitted.]

B. Conversion

Farver contends that the trial court erred in granting summary disposition to Citizens on his conversion claim because there is a genuine issue of material fact regarding whether the guaranty applied to any transactions other than the original $300,000 line of credit and whether he or Citizens terminated the guaranty agreement.

We reject Farver's claim that the guaranty applied only to the original $300,000 line of credit. "Under ordinary contract principles, if the language of a contract is clear and unambiguous, its construction is a questions of law for the court." *Michigan Nat'l Bank v*

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[3] Thereafter, the trial court allowed Farver to file a first amended complaint to seek contribution from King and to reassert the subrogation claim. On May 18, 2000, following mediation, the trial court entered judgment against King for $30,000 and dismissed the case with prejudice and without costs. King has not appealed that judgment.

Laskowski, 228 Mich App 710, 714; 580 NW2d 8 (1998). The guaranty provides that "[i]n particular, [Farver] guarantees payment of the attached Note and any renewals thereof." While the "Note" is not attached to the documents filed with this court, Farver appears to argue that the Note reflected the $300,000 line of credit and that the parties intended only to obligate Farver for that loan. However, Farver's contention is contradicted by the guaranty itself. Clearly, the line of credit was merely one transaction to which Farver obligated himself.

The plain language of the guaranty agreement provides that Farver will guaranty all sums owed by Clark to Citizens, whether owing at the time of the agreement or in the future and whether the liabilities are monies, notes, bills, loans or other indebtedness. While the guaranty limits his liability to $300,000, the same amount as the initial line of credit, the guaranty nonetheless unequivocally contemplates Farver's obligation to fully and promptly pay *all* of Clark's indebtedness to Citizens, up to that amount. Not only does this demonstrate that Farver guaranteed more than the line of credit, it also undermines his claim that the mere termination of the line of credit also terminated his obligations under the guaranty.

We agree with the trial court that no genuine issue of material fact exists regarding a termination of the guaranty. First, Citizens' decision to curtail Clark's line of credit and Farver's decision to pay off the balance owed on the line of credit did not constitute a termination of the guaranty agreement. As explained above, the guaranty clearly applied, broadly, to all of Clark's debts to Citizens and Citizens' decision to cancel this credit did not serve to cancel the guaranty agreement with regard to any other sums owed by Clark. Regarding Farver's repayment of the line of credit, the guaranty specifically provides that:

> This shall be a continuing guaranty and shall not be considered as wholly or partially satisfied by the payment at any time of any sum of money, due or owing, or hereafter due or owing upon any such initial, renewal, extended, successive or future loans, advances or credits, now or hereafter contracted, including both principal and interest.

Accordingly, without more, Farver's decision to pay off the line of credit did not constitute a termination or satisfaction of his broad obligations thereunder.

We also agree with the trial court that the letter Farver's attorney sent to Citizens did not constitute a termination or attempt to terminate the guaranty.[4] Farver's attorney requested the return of Farver's stocks. However, as the trial court correctly ruled, the letter does not contain a request or demand to terminate the guaranty agreement. Rather, in the letter, Farver's counsel acknowledges that Clark continued to owe money under the real estate mortgage, but asserts that Citizens was over-collateralized on it and, therefore, it could release the stocks back to Farver.[5]

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[4] Because there is no evidence showing that Farver or Citizens attempted to terminate the guaranty agreement, we need not reach the issue whether one party may unilaterally terminate a guaranty under Michigan law.

[5] Further, while Farver asserts in his complaint that his attorney demanded a termination of the guaranty over the telephone, his follow-up letter does not support this assertion and Farver failed
(continued…)

The guaranty and pledge agreements clearly allowed Citizens to use the stock to cross-collateralize the real estate and construction loans. Also, the guaranty unambiguously provides that Citizens "may proceed directly against [Farver] . . . without resort to any other person or to the assets of the said customer, or other security held by [Citizens] . . . ." Thus, though Clark and King also guaranteed those loans, the agreement makes clear that Citizens was not obligated to first collect from Clark or King before collecting from Farver. Based on the above evidence, Citizens' decision to hold the stocks as collateral and to sell them after Clark's default and bankruptcy was clearly authorized and expressly contemplated by the guaranty agreement and, accordingly, did not constitute conversion.[6]

C. Negligence

We hold that the trial court correctly granted summary disposition to Citizens on Farver's negligence claim.

In his complaint, Farver alleges that Citizens owed him a duty "to follow reasonably recognized banking practices to prevent loss to the bank and the stock holders and to the Guarantor of any indebtedness . . . guaranteed by [Farver.]" Farver claimed that Citizens breached that duty by continuing to loan money to Clark, allowing him to overdraw his account, failing to supervise his business practices and failing to place liens on cars financed through Citizens. As noted, the trial court ultimately granted summary disposition to Citizens because all of Farver's claims arise under the guaranty agreement and no independent legal duty exists to support a negligence claim.

Citizens' obligations and Farver's allegations clearly arise out of the guaranty and pledge agreements Farver entered with Citizens. Accordingly, Farver's remedy is for breach of contract, not negligence. As our Supreme Court has explained:

> The cases are numerous and confusing as to the dividing line between actions of contract and of tort; and there are many cases where a man may have his election to bring either action. When the cause of action arises merely from a breach of promise, the action is in contract. The action of tort has for its foundation the negligence of the defendant, and this means more than a mere breach of a promise. Otherwise, the failure to meet a note or any other promise to pay money, would sustain a suit in tort for negligence, and thus the promissor be made liable for all the consequential damages arising from such failure. As a general rule, there must be some active negligence or misfeasance to support tort. [*Hart v*

(…continued)

to present an affidavit of other documentary evidence showing that he made such a demand.

[6] Regarding Farver's claim that Citizens failed to present documentary evidence in support of its motion, as Citizens correctly asserts, for purposes of its motion, it relied on documents already in the record and attached to Farver's complaint. These documents were sufficient to support Citizens' motion and did not constitute a violation of MCR 2.116(G)(3). *Farm Bureau Mut Ins Co v Blood*, 230 Mich App 58, 65-66; 583 NW2d 476 (1998).

Ludwig, 347 Mich 559, 563-564; 79 NW2d 895 (1956), quoting *Tuttle v Gilbert Mfg Co*, 145 Mass 169, 13 NE 465 (1887)]

In other words, "[f]or an action in tort to exist . . . there must be a breach of a duty separate and distinct from the duties imposed by the contract." *Nelson v Northwestern Savings and Loan Ass'n*, 146 Mich App 505, 509; 381 NW2d 757 (1985). Here, Farver's claims arise solely under the guaranty and pledge agreements and he fails to allege a breach of independent duty giving rise to a tort action.

As discussed, Farver's claim that Citizens should have collected from Clark or King is contemplated and controlled by the guaranty agreement. The guaranty specifically states that, notwithstanding the existence of other security or other guarantors, Citizens "may proceed directly against" Farver. Furthermore, Farver's allegation that Citizens breached a duty by continuing to loan money to Clark, allowing him to overdraw his account, failing to supervise his business practices and failure to secure liens on cars financed by Citizens do not give rise to separate tort claims. As Citizens observes, the guaranty agreement binds Farver to fully and promptly pay all of Clark's indebtedness and specifically provides that Farver "consents to any and all extensions or renewals made for or on account of any loan, note, bills, or other indebtedness dues from [Clark] to [Citizens] without releasing or discharging the undersigned in any way whatsoever hereunder." While the agreement is very broad and far-reaching, Farver may not seek redress through an action in tort when he is contractually bound by the terms to which he agreed. Indeed, as a businessman and a contracting party, Farver must be charged with knowing the comprehensiveness of the guaranty he voluntarily executed.

We also note that the trial court properly corrected its misapplication of the UCC's duty of good faith. It is well-settled in this state that "Michigan does not recognize an independent tort action for an alleged breach of a contract's implied covenant of good faith and fair dealing." *Ulrich v Federal Land Bank of St Paul*, 192 Mich App 194, 197; 480 NW2d 910 (1991). Moreover, "[a] lack of good faith cannot override an express provision in a contract." *Eastway & Blevins Agency v Citizens Ins Co of America*, 206 Mich App 299, 303; 520 NW2d 640 (1994). Farver has not asserted a claim for breach of contract and no independent tort action permits recovery.[7] Accordingly, the trial court properly granted summary disposition to Citizens on Farver's negligence claim.

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[7] Farver urges that "there is an independent duty created separate from the guaranty contract and supported by existing Michigan law" for increasing Farver's obligation under the guaranty agreement and for failing to minimize Farver's damages. Specifically, Farver claims that MCL 440.9207 creates a duty independent from the guaranty agreement itself.

We note that, in his complaint, Farver failed to assert that Citizens owed or breached a duty under Article 9. Rather, Farver claimed only that Citizens owed him a duty "to follow reasonably recognized banking practices to prevent loss . . . ." Were we to find that Farver pleaded this issue with minimal sufficiency, his claim nonetheless fails as a matter of law. The alleged failure by Citizens to place liens on cars does not discharge Farver's obligations as guarantor and he cannot maintain a separate cause of action based on a claim that this impaired his collateral stock. See *Shurlow v Bonthuis*, 456 Mich 730, 740-743; 576 NW2d 159 (1998).

Affirmed.

/s/ Henry William Saad
/s/ Donald S. Owens
/s/ Jessica R. Cooper